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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF CALIFORNIA,
Petitioner,

vs.

VINCENT HARVIER, as Chairman of the Quechan Tribal Council, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the tribal sovereign immunity doctrine bars an action by a state to restrain tribal officials from carrying out a tribal ordinance that is allegedly in violation of federal law, in circumstances where the tribal ordinance prohibits the state from applying its laws to non-Indians who hunt and fish on the reservation.

2. Whether an order dismissing a complaint is a final and appealable decision under 28 U.S.C. § 1291.

LIST OF THE PARTIES

The plaintiff and petitioner is the State of California. The defendants and respondents are Vincent Harvier, as Chairman of the Quechan Tribal Council; George Bryant, William Curran, Joseph Jackson, Anderson Miguel, Jr., and Rebecca Ramirez, as members of the Quechan Tribal Council; and Neil Hill, as Fish and Game Warden for the Quechan Tribe of Indians.

TABLE OF CONTENTS

	Page
Questions presented	i
List of the parties	i
Opinions below	1
Jurisdictional grounds	1
Applicable federal laws	2
Statement of the case	2
Argument	8
Introduction	8
I	
The court should review this case to clarify the rationale and application of the tribal immunity doctrine, and perhaps to determine whether the doctrine has continuing vitality	9
A. The tribal immunity doctrine lacks clarity in rationale and application	9
B. The lower decision effectively bars litigants from challenging the validity of tribal ordinances and policies under federal law	13
C. Even assuming arguendo that the lower court meant to hold that litigants can challenge the validity of tribal ordinances by proper styling of the complaint, the case is appropriate for review by this Court	17
D. This court may wish to re-examine the validity of the tribal immunity doctrine	19
II	
This court should resolve the conflict between the circuit courts of appeal with respect to the appealability of orders dismissing complaints	23
Conclusion	23

TABLE OF AUTHORITIES

Cases

	Page
Andrus, Secretary of the Interior v. Sierra Club, 442 U.S. 347 (1979)	10
Blair v. Cleveland Twist Drill Co., 197 F.2d 842 (7th Cir. 1942)	21
Bottomly v. Passamaquoddy Tribe et al., 599 F.2d 1061 (1st Cir. 1979)	14, 17
Catlin v. United States, 324 U.S. 229 (1945)	22
Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)	20
Dugan v. Rank, 372 U.S. 609 (1963)	10
Edelman v. Jordan, 415 U.S. 651 (1974)	10, 20
Ex parte Young, 209 U.S. 123 (1908)	10, 15, 20
Firchau v. Diamond Nat'l Corp., 345 F.2d 269 (9th Cir. 1965)	21
Florida Lime and Avacado Growers v. Paul, 373 U.S. 132 (1962)	7
Forgay v. Conrad, 47 U.S. (6 How.) 200 (1848)	22
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)	7
Hans v. Louisiana, 134 U.S. 1 (1890)	10
Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949)	9, 10, 11, 15, 18, 20
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	14
Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962)	21, 22
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)	19
Organized Village of Kake v. Egan, 369 U.S. 60 (1962)	4, 19
Parden v. Terminal Railway, 377 U.S. 184 (1964)	10
People v. Quechan Tribe, 595 F.2d 1153 (9th Cir. 1979)	3
Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977)	8, 11, 20

Table of Authorities

Cases

	Page
Rineri v. News Syndicate Co., 385 F.2d 818 (2d Cir. 1967)	21
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	11, 12, 20
United States v. United States Fidelity & Guaranty Co., 309 U.S. 509 (1940)	11
Washington v. Confederated Tribes, 447 U.S. 134 (1980)	18
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)	4, 19
Williams v. Lee, 358 U.S. 217 (1959)	19
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)	19
Zadig v. Aetna Ins. Co., 42 F.2d 142 (2d Cir. 1930)	21

Constitution

United States Constitution:	
Eleventh Amendment	9, 10, 19
Supremacy Clause	7

Texts, Statutes and Rules

25 U.S.C. §§ 1301-1303	12
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	i, 2, 5, 21, 22
28 U.S.C. § 2201	3
Rules of the Supreme Court:	
Rule 17(.1)(a)	9
Rule 17(.1)(c)	8
Moore, Federal Practice (2d ed. 1982)	21, 22

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OPINIONS BELOW

The decision of the U.S. Court of Appeals is set forth at Appendix 1-20, and the decision of the district court is set forth at Appendix 21-23. Neither decision has yet been officially reported.

JURISDICTIONAL GROUNDS

The decision of the U.S. Court of Appeals was filed on March 4, 1983, and no petition for rehearing was filed or is pending.

This Court has jurisdiction to review the lower judgment on writ of certiorari under 28 U.S.C. § 1254(1).

APPLICABLE FEDERAL LAWS

The tribal immunity issue raised herein is based on the common law, not on federal constitutional or statutory provisions.

The appealability issue raised herein is based on 28 U.S.C. § 1291, which provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Sureme Court."

STATEMENT OF THE CASE

In 1975, the Quechan Indian Tribe, which occupies the Fort Yuma Reservation in California, adopted a tribal ordinance providing for exclusive tribal jurisdiction over non-Indians who hunt and fish on the reservation. Under the ordinance, non-Indians can hunt and fish on the reservation if they have a permit issued by the Tribe, regardless of whether they have a permit issued by the State of California. In 1976, California filed an action for declaratory relief against the "Quechan Tribe of Indians," asking for a judgment that (1) California fish and game laws apply to non-Indians who hunt and fish on the reservation and (2) California fish and game officials have the right to enter the reservation to enforce California laws against

non-Indians on the reservation.[1] The district court held that California laws apply to non-Indians on the reservation, but that California officials cannot enter the reservation to enforce such laws. Both sides appealed.

The Court of Appeals, without reaching the merits, dismissed the action on grounds that the tribal immunity doctrine bars actions against Indian tribes. *People v. Quechan Tribe,* 595 F.2d 1153, 1154 (9th Cir. 1979). The appellate court ruled that the tribal immunity defense, although not raised at the trial level, could be raised for the first time on appeal. 595 F.2d at 1154.

In 1979, California brought another action—for declaratory judgment under 28 U.S.C. § 2201—to resolve the controversy. This time, following the familiar practice in sovereign immunity cases of suing the official rather that the sovereignty, California brought its action against the tribal officials acting on behalf of the Tribe. The complaint names one defendant "as Chairman of Quechan Tribal Council," five other defendants "as members of Quechan Tribal Council," and another defendant "as Fish and Game Warden for Quechan Tribe of Indians." Complaint, at 1. The complaint alleges that the "defendants are officers of the Quechan Tribe of Indians, and are sued in their capacity as such." Complaint, ¶ 4, at 2. The complaint seeks a decla-

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[1]California asserts concurrent, not exclusive, jurisdiction over non-Indians who hunt and fish on the reservation. In California's view, non-Indians must obtain a State permit even though they may also be required to obtain a tribal permit.

ration that the defendants, in carrying out the tribal ordinance, are violating federal law.[2]

The defendants filed a motion to dismiss the complaint on tribal immunity grounds. The district court granted the motion, reasoning that California cannot obtain relief against the tribal officials that cannot be obtained directly against the Tribe.[3] The court commented that the Supreme Court "has not established any clear directives" with respect to the tribal immunity doctrine and "has not enunciated any rule for determining those circumstances" in which the doctrine applies. App. 22. According to the court, lower federal courts have distinguished "between suits against tribal members in their individual capacities, which may be maintained, and suits against them in their representative capacities, which may not be maintained." App. 22. Since, according to the court, the present suit was "clearly brought against the defendants in their representative capacities," the action "is barred by the doctrine

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[2]According to the complaint, California laws apply to non-Indians on the reservation pursuant to "general principles of federal Indian law" and various statutory principles. Complaint ¶ 7, at 3. The reference to "general principles of federal Indian law" is a reference to the common law rule developed by this Court authorizing the application of state laws on Indian reservations except where such state laws are preempted by Congress or interfere with tribal self-government. See, *e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

[3]In oral argument, the district court said that California was improperly "trying to come in through the back door" by suing tribal officials for relief which could not be obtained directly against the tribe. Tr. 11. In its dismissal order, the court said that "this suit varies from the previous one only in that defendants are not the tribe itself, but various members of the Tribal Council and the Fish and Game Warden of the Tribe." App. 21-22.

of sovereign immunity of Indian Tribes." App. 23. In May 1980, California appealed the dismissal order to the Court of Appeals.

The defendants filed a motion to dismiss the appeal on grounds that an order dismissing a complaint is not a final and appealable decision under 28 U.S.C. § 1291. As we explain later, most circuit courts of appeal take the view that an order dismissing a complaint is final and appealable. See text accompanying note 9, *infra*. The Ninth Circuit, however, takes the view that such an order is appealable only if it is "clear" that the court below found that "the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make." App. 2. California, in replying to the motion to dismiss the appeal, argued that it could not have been reasonably expected to amend its complaint, because the district court had made clear that California could not obtain relief against tribal officials that could not be obtained directly against the Tribe. An appellate panel upheld California's position and denied the defendants' motion to dismiss the appeal. The merits of the tribal immunity issue were then briefed and argued.

On March 4, 1983, nearly three years after California filed its appeal, the Court of Appeals issued a divided opinion upholding the district court's decision. The majority opinion, written by Judge Reinhardt and joined by Judge Hauk sitting by designation, upheld the district court ruling that California cannot sue the tribal offcials in their "official" capacities, and can only sue them in their "individual" capacities. App. 3-4. California, it was stated,

is free to amend its complaint to allege that the tribal officials "had exceeded the scope of their authority or were otherwise subject to suit in their individual capacities." *Id.* The majority opinion concluded that the district court's dismissal order was not appealable because California could have been "reasonably expected to amend" its complaint to sue the defendants in their "individual" capacities.[4] The majority opinion thus reversed, *sub silentio*, the earlier ruling of another appellate panel which had denied the defendants' motion to dismiss the appeal on grounds that California could *not* have been reasonably expected to amend its complaint. In effect, seven years after California filed its original action and four years after it filed its second action, the Court of Appeals once again failed to reach the merits of the controversy, again dismissing California's action on tribal immunity grounds.

The dissenting opinion, written by Judge Norris, correctly perceived that California sued the defendants in their "official" capacity because they were carrying out a tribal policy that was allegedly violative of federal law, and had *not* sued them in their "individual" capacity because they had not committed any unlawful acts beyond the scope of their authority under tribal law. According to the dissenting opinion, the State alleged that the defendants, "though not acting *ultra vires*," were "carrying out official

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[4]In fact, the district court had made clear, both in oral argument and its dismissal order, that California could not sue the tribal officials for relief which could not be obtained directly against the Tribe. See note 3, *supra*, and accompanying text. Under this view, such relief is unobtainable whether California sues the tribal officials in their "official" or "individual" capacities.

duties in violation of the Constitution."[5] App. 10 "It is this theory," the dissenting opinion states, which "the majority completely ignores and on which California rests its complaint." *Id.* The dissenting opinion commented that "to amend the complaint to sue the officers as individuals, as the majority opinion and district court demand, would change the gravamen of the state's entire claim." App. 14. Hence, the dissenting opinion concluded, the district court's dismissal order *was* appealable because California could not have been reasonably expected to amend its complaint.

To summarize, although the immediate issue decided by the court was the appealability of the dismissal order, this issue turned on whether California can sue the tribal officials in their official capacity to restrain them from carrying out an allegedly unlawful tribal policy. The majority judges and the district judge ruled that California can only sue the tribal officials in their "individual" capacity, not in their "official" or "representative" capacity. Although the majority opinion characterized this result as "narrow," App. 6, the practical effect is that tribal officials can only be restrained from committing "individual" acts beyond the scope of their authority under tribal law; they cannot be restrained from acting "officially" on behalf of the Tribe

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[5]Judge Norris correctly assumed that, if the tribal ordinance is invalid under federal statutory principles or under federal common law principles defining the applicability of state laws on Indian reservations, see note 2, supra, the tribal ordinance is ultimately invalid under the Supremacy Clause of the U.S. Constitution. Cf. *Florida Lime and Avacado Growers v. Paul,* 373 U.S. 132, 143 (1962) (preemption doctrine based on Supremacy Clause); *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824) (negative aspect of Commerce Clause based on Supremacy Clause).

in carrying out an allegedly unlawful tribal policy. The dissenting opinion correctly understood that, if California cannot sue the defendants in their "official" capacity, it cannot prevent them from carrying out an unlawful tribal policy; to require California to sue them in their "individual" capacity would "change the gravamen" of the State's claim. App. 14. Indeed, California has no complaint against the defendants for "individual" acts in excess of their authority under tribal law; its only complaint is that the defendants, acting as tribal representatives, are applying and enforcing an unlawful tribal policy. By preventing California from asserting the latter claim, the majority opinion effectively precludes litigants from challenging the validity of tribal laws and policies, and deprives California of the only claim that it has against the defendants.

ARGUMENT

INTRODUCTION

The primary issue raised in this petition involves the scope and effect of the tribal immunity doctrine. This issue raises an "important question of federal law which has not been, but should be, settled by this Court . . ." Rule 17(.1)(c), Rules of the Supreme Court. In line with Justice Blackmun's recent suggestion, the Court may wish to broadly determine whether the tribal immunity doctrine has continuing vitality under modern circumstances. See *Puyallup Tribe, Inc. v. Department of Game,* 433 U.S. 165, 178-179 (1977) (Blackmun, J., concurring). If the Court does not wish to go this far, it should at least clarify the rationale and application of the doctrine. As the district court below properly observed, the circumstances of the

doctrine's application are presently unclear. App. 22. This case presents an excellent opportunity to provide such clarification, for the majority opinion below effectively holds that the doctrine allows actions against tribal officials only when they exceed their authority under tribal law, but not when the tribal law itself is in violation of federal law.

The second issue raised in this petition is the appealability of an order dismissing a complaint. A conflict exists among the circuit courts of appeal with respect to this issue, which provides an additional basis for review of this case. Rule 17(.1)(a), Rules of the Supreme Court. Importantly, the appealability issue is inseparably linked with the tribal immunity issue, since the appealability of the dismissal order depends on the scope and effect of the tribal immunity doctrine. Hence, there is no danger that the Court may fail to reach the tribal immunity issue depending on its resolution of the appealability issue.

I

THE COURT SHOULD REVIEW THIS CASE TO CLARIFY THE RATIONALE AND APPLICATION OF THE TRIBAL IMMUNITY DOCTRINE, AND PERHAPS TO DETERMINE WHETHER THE DOCTRINE HAS CONTINUING VITALITY

A. The Tribal Immunity Doctrine Lacks Clarity In Rationale and Application

This Court has, in several cases, fully defined the scope of the sovereign immunity doctrine as applied to the federal government, and as applied to the states under the Eleventh Amendment of the U.S. Constitution. In *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949), the Court

held that the federal immunity doctrine bars actions against the federal government and its representatives, subject to two exceptions. First, an action can be brought against a federal officer in his "individual" capacity for acts that are *ultra vires* his statutory authority, *i.e.* where "the officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." 337 U.S. at 689. Second, an action can be brought against a federal officer in his official capacity where "the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional." *Id.* at 690. See *e.g., Dugan v. Rank,* 372 U.S. 609, 621-622 (1963). Thus, the first exception authorizes action against federal officials in their "individual" capacity when they act *ultra vires* their statutory authority, and the second authorizes actions against them in their official capacity when they act pursuant to authority which is allegedly unconstitutional. The second exception is now so well recognized that it is rarely discussed in cases where it is applied. See, *e.g., Andrus, Secretary of the Interior v. Sierra Club,* 442 U.S. 347 (1979).

Under the Eleventh Amendment, the states are immune from actions brought in federal courts either by citizens of other states or by citizens of the defendant state. See, *e.g., Hans v. Louisiana,* 134 U.S. 1 (1890); *Parden v. Terminal Railway,* 377 U.S. 184, 186 (1964). In *Ex parte Young,* 209 U.S. 123 (1908), this Court held that the Eleventh Amendment only bars actions seeking retrospective relief against a state, not actions seeking prospective relief. See also *Edelman v. Jordan,* 415 U.S. 651 (1974).

In contrast, few cases define the rationale or effect of the tribal immunity doctrine. The doctrine was first expounded in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), where—in an action for monetary relief brought by an Indian tribe—this Court refused to allow a cross-complaint for monetary relief *against* the tribe. The Court, without analyzing the policy or wisdom of extending the sovereign immunity doctrine to Indian tribes, commented simply that "the immunity which was theirs [the tribe's] as sovereigns passed to the United States for their benefit, as their tribal properties did." 309 U.S. at 512. Since this decision predated the Court's decision in *Larson v. Domestic & Foreign Corp., supra,* which defined the two exceptions to the federal immunity doctrine, the Court in *Fidelity & Guaranty* did not indicate whether the same two exceptions applied to the tribal immunity doctrine.

In two recent cases, this Court has indicated that the tribal immunity doctrine may be subject to exceptions, although the exact nature of the exceptions was not spelled out. See *Puyallup Tribe v. Department of Game,* 433 U.S. 165, 172-173 (1977); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). In *Puyallup,* the Court held that the doctrine does not apply to individual tribal members who are not tribal officials, and are not purporting to act on behalf of the Tribe. 433 U.S. at 172. In *Martinez,* the Court held that the doctrine *does* apply to intra-tribal disputes, *i.e.,* where a tribal member sues tribal officials for carrying out

acts on behalf of the Tribe.[6] Neither case considered the broad question, raised here, whether the doctrine bars actions challenging the validity of tribal laws, at least where intra-tribal disputes are not involved. Hence, this issue is novel and important. It is likely to arise again in another case involving another Tribe in California.[7] The district court below was correct in observing that this Court "has not established any clear directives" concerning the tribal immunity doctrine, and "has not enunciated any rule for determining those circumstances" where it is applied. App. 14. The case thus merits the attention of this Court.

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[6]In *Martinez*, the Court held that the tribal immunity doctrine bars an action by tribal members against tribal officials in an intra-tribal dispute, where the action would impair the ability of the tribe to govern itself. 436 U.S. at 59-62. There, a tribal member sued tribal officials for carrying out a tribal ordinance that was allegedly unlawful under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303. The Court, noting that the tribe had established a forum for the resolution of "intra-tribal disputes," 433 U.S. at 59-60, ruled that an abrogation of the tribal immunity doctrine would undermine the adjudicatory machinery established by the tribe for the resolution of intra-tribal disputes, and thus "infringe on the right of the Indians to govern themselves," *id.* at 59. The case is distinguishable here because the instant dispute is between the State and the Tribe, and is not an intra-tribal dispute. Further, the Tribe here, unlike the tribe in *Martinez*, has no judicial machinery for the resolution of the dispute. Moreover, even if such machinery existed, the sovereign State of California could not be expected to submit to a tribal forum for the resolution of this significant jurisdictional issue.

[7]The Covelo Indian Community, which occupies the Round Valley Indian Reservation in California, is considering the adoption of regulations that would expressly "preclude" State regulation of or jurisdiction over non-Indians who hunt and fish within the boundaries of the reservation. If the regulations are adopted, California will almost certainly bring an action challenging their validity on the same grounds that underlie the instant action.

B. The Lower Decision Effectively Bars Litigants From Challenging the Validity of Tribal Ordinances and Policies Under Federal Law

In this case, California brought its action against the tribal officials in their official rather than individual capacity for two reasons. First, the tribal officers were acting in their official capacity in enforcing a tribal ordinance that prevents California from applying its laws to non-Indians who hunt and fish on the reservation. Thus, California's grievance derives from the defendants' acts in their capacity as tribal officers, not from acts unrelated to their official conduct. Second, if California obtains a judgment against the tribal officials in their individual rather than official capacities, the Tribe could defeat the judgment simply by electing new officers. To ensure that the judgment runs against the office rather than the individual who momentarily occupies it, California brought its action against the tribal officers in their official capacities.

The majority opinion, in holding that California can sue the defendants in their "individual" but not "official" capacities, effectively allows California to sue the defendants only for acts *ultra vires* their authority under tribal law, and not for carrying out an allegedly unlawful tribal ordinance. In effect, the opinion bars judicial challenges to the validity of tribal policies under federal law. The opinion thus adopts the reasoning of the district court, which ruled that California cannot "come in through the back door" by seeking relief against tribal officials that cannot be obtained directly against the Tribe. See note 3, *supra*. Under this result, Indian tribes are apparently above the law in the sense that no remedy is available to

restrain them from pursuing an unlawful course of conduct. Neither the federal government nor the states have such an exalted status under the sovereign immunity doctrine. Thus, although the majority opinion purported to resolve only the "narrow" question of the proper styling of the complaint, App. 6, the decision effectively extends the tribal immunity doctrine beyond the bounds of the sovereign immunity doctrine as applied to the federal government and the states. The decision is narrow only in the sense that *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803) involved the narrow question whether William Marbury was entitled to retain his commission as a justice of the peace.

The lower court, in distinguishing between "official" and "individual" acts of tribal officers, relied on lower federal decisions holding that actions cannot be maintained against tribal officers for the recovery of tribal assets. App. 22. In *Bottomly v. Passamaquoddy Tribe et al.,* 599 F.2d 1061 (1st Cir. 1979), the First Circuit held than an attorney could not maintain an action against tribal officers in their "official" capacity for recovery of attorney fees, since the fees would be ultimately paid by the tribe. Assuming that *Bottomly* was correctly decided, it stands only for the proposition that tribal officials cannot be sued for monetary relief that would ultimately be paid by the tribe. The lower court, by extending the *Bottomly* rationale to this case, has effectively held that tribal officials are immune not only from suits for monetary relief, but also from suits to restrain them from engaging in an unlawful course of conduct. This Court, in federal and state sovereign immunity cases, has clearly distinguished between actions against

sovereign officials for monetary relief and actions to restrain them from engaging in an unlawful course of conduct. See, *e.g., Ex parte Young,* 209 U.S. 123 (1908). In other words, the proper distinction is between actions for prospective and retrospective relief, not actions against officers in their "official" and "individual" capacity. By applying the wrong distinction here, the lower court has defined and applied the tribal immunity doctrine differently than the sovereign immunity doctrine as applicable in other contexts.

The sweeping ramifications of the majority opinion are reflected in the breadth of the defendants' argument below, which was largely adopted in the majority opinion. The defendants argued that actions cannot be maintained against Indian tribes or officials in the absence of "a clear Congressional authorization for suit," and thus that the *Larson* exceptions do not fully apply in the tribal context. Brief of Appellees, 33.[8] The majority opinion, by holding

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[8]The defendants made the following assertions in their appellate brief:

(1) "The effects of any judicial determination [in this case] would certainly operate primarily against the Tribe as a whole instead of the named officers," and "this is not a case where an officer is withholding seized goods or is accused of tortious wrongdoing," Brief of Appellees at 25;

(2) "Traditional motions of individual federal officers' immunity cannot be applied wholesale to Indian tribes," *id.* at 26;

(3 "Since the combined functions of government are often carried out by a tribal Council, it is not always easy to determine whether tribal officers are acting in a legislative, judicial or executive capacity at any given time," and hence "there is considerable doubt whether the *Larson* line of cases . . . can be applied broadly to Indian tribal officials," *id.* at 30;

that tribal officers cannot be sued in their "official" capacity, largely adopted the defendants' argument. The dissenting judge fully understood the broad ramifications of the majority opinion, commenting that California "has complained of acts under color of an ordinance it alleges is unconstitutionally void" and "has not complained of any *ultra vires* act;" hence, to amend the complaint to sue the officers as individuals, as the majority and district court demand, would change the gravamen of the state's entire claim."

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(4) The "plaintiffs' basic assertion that this case can be 'resolved by preference to the general doctrine of sovereign immunity . . is not an accurate statement,' " *id.* at 31;

(5) Because of "the conceptual and legal difficulties of applying the *Larson* line of cases to Indian tribal officials," such suits cannot be maintained unless the plaintiffs "demonstrate a clear Congressional authorization for suit," *id.* at 33;

(6 Under the tribal immunity doctrine, "officials' actions are not invalid merely because they are based on an incorrect decision as to law or fact, 'if the officer making the decision was empowered to do so,' " *id.* at 34;

(7) The "plaintiffs' difficulty lies in the fact that the actions it complains of were within the officers' authority, and thus, under the *Larson* test, cannot furnish the basis for an individual suit," *id.* at 35;

(8) "Even applying its [*Larson's*] test to the Quechan officers' actions, it is clear that the actions are those of the Tribe rather than the individual officers," *id.* at 36;

(9) "If Quechan's officers had the authority to make the assertions, their actions are protected as those of the sovereign," *id.*;

(10) "Since the expression of the [legal] position is within the officer's authority, it cannot serve as the basis for an individual suit against the officers," *id.* at 39; and

(11) For all the above reasons, it is "more appropriate to settle these sorts of controversies in other forums, in recognition that the judiciary is frequently not the institution of government best suited to resolve such disputes," *id.* at 41.

App. 14. Indeed, we are not aware that the defendants have committed any unlawful "individual" acts beyond their authority under tribal law, and any such acts would be irrelevant to our complaint in any event.

The case is ripe for review now. The lower decision, although nominally allowing California to amend its complaint to sue the defendants in their "individual" capacity, effectively allows California only to sue the officers for exceeding their authority under tribal law, not for carrying out an unlawful tribal ordinance. The opinion thus allows California to assert a claim that it does *not* have, and bars California from asserting the claim that it *does* have. Unless the Court grants our petition, the case is over for all practical purposes.

C. Even Assuming Arguendo that the Lower Court Meant Only To Require That The Complaint Be Styled In A Particular Way, The Case Is Appropriate for Review By This Court

It might be argued that the majority opinion meant only to hold that California can challenge the validity of the tribal ordinance by suing the defendants in their "individual" capacity, and thus by simply changing the labels in its complaint. This interpretation is unlikely, since California cannot logically sue the tribal officers in their "individual" capacity for acts undertaken pursuant to their *official* authority under tribal law. The majority opinion obviously meant to affirm the district court conclusion, based on the *Bottomly* rationale, that California cannot obtain relief against tribal officials that cannot be obtained directly against the Tribe, see note 3, *supra*, a result consistent

with the defendants' argument that the *Larson* exceptions do not apply to Indian tribes and officials, see note 8, *supra*.

Assuming *arguendo* nonetheless that the majority opinion meant only to require a change in the labels of the complaint, we believe that this case merits this Court's attention for a different reason. If the liability of tribal officials depends on whether they are nominally sued in an "individual" or "official" capacity, then their liability depends on the form of the appellation rather than the substance of their conduct. This result simply elevates form over substance. If form thus prevails, then the rules governing the tribal immunity doctrine are vastly different from the substance-oriented rules generally applicable in the field of federal Indian law. See, *e.g., Washington v. Confederated Tribes*, 447 U.S. 134, 156 (1980) (applicability of state laws on Indian reservations depends on an "accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other"). If this anomaly exists, then this Court should plainly say so. Otherwise, future litigants may fall into the same semantical traps that, according to the majority opinion below, have waylaid California here. Because of the ambiguities surrounding the tribal immunity doctrine, California has failed to reach the merits of its action after two attempts spanning seven years. Surely the tribal immunity doctrine, whatever it means, must now be clarified so that these injustices of delay will not be incurred by other litigants in future cases.

Further, California cannot obtain adequate relief by suing the tribal officers in their "individual" capacity, as the majority opinion suggests that California should try

to do. If the defendants are sued in their "individual" rather than "official" capacity, any judgment in California's favor would run against the defendants in their private capacity, rather than against the office that they occupy. Under this result, the Tribe could easily defeat such a judgment by simply electing new officers. Hence, California lacks an adequate remedy against the defendants in their "individual" capacity, and the majority opinion was simply wrong in suggesting that such a remedy is available to California.

D. This Court May Wish To Re-examine The Validity Of The Tribal Immunity Doctrine

The Court may wish to determine the broader question whether the doctrine of tribal immunity retains vitality in light of recent decisions generally limiting sovereign immunity, and specifically limiting tribal sovereignty. At one time, this Court took the view that Indian reservations are distinct nations whose boundaries cannot be penetrated by the laws of the surrounding states. See *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 561 (1832). This early view, however, "has yielded to closer analysis," and state laws are now applicable on Indian reservations except where the state laws are preempted by Congress or interfere with tribal self-government. *Organized Village of Kake v. Egan,* 369 U.S. 60, 72, 75 (1962). See, *e.g., White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980); *Williams v. Lee,* 358 U.S. 217, 220 (1959). This Court has expressly narrowed the concept of tribal sovereignty, stating that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172 (1973). Independently, this Court has steadily narrowed the scope of the sovereign immunity doc-

trine as applied to the federal government and—through the Eleventh Amendment—to the states. See, *e.g., Larson v. Domestic & Foreign Corp.,* 337 U.S. 682 (1949) (federal sovereign immunity); *Ex parte Young,* 209 U.S. 123 (1908) (state sovereign immunity under Eleventh Amendment).

These developments raise a question whether the tribal immunity doctrine—which has never been spelled out with clarity by this Court—retains its vitality in the modern age, particularly with respect to matters involving regulation rather than tort, contract, or property. Justice Blackmun recently commented that he "entertains doubts . . . about the continuing vitality in this day of the doctrine of tribal immunity . . . ," and believes "that doctrine may well merit re-examination in an appropriate case." *Puyallup Tribe, Inc. v. Department of Game,* 433 U.S. 165, 178-179 (1977) (Blackmun, J., concurring). We believe that this may be an appropriate case.

The doubts about the continuing vitality of the tribal immunity doctrine are strengthened by the nature of its conceptual origin. In *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978), this Court said that the tribal immunity doctrine is a "common-law immunity from suit traditionally enjoyed by sovereign powers." Even the states, however, lack sovereign immunity under the common law. See *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419 (1793). The states' immunity was attained only by passage of a constitutional amendment. See, *e.g., Edelman v. Jordan,* 415 U.S. 651, 662-663 (1974). Since the states lack a common law immunity, and since Indian tribes stand on a lesser sovereign footing than the states under our constitutional system, it is questionable whether the Indian tribes can properly possess a common law immunity not enjoyed by the states.

II

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL WITH RESPECT TO THE APPEALABILITY OF ORDERS DISMISSING COMPLAINTS

Under 28 U.S.C. § 1291, appeals can only be taken from "final decisions." The Second and Seventh Circuits take the view that an order dismissing a complaint is final and appealable under this section. See *Rineri v. News Syndicate Co.*, 385 F.2d 818, 821 (2d Cir. 1967); *Zadig v. Aetna Ins. Co.*, 42 F.2d 142, 143 (2d Cir. 1930); *Blair v. Cleveland Twist Drill Co.*, 197 F.2d 842 (7th Cir. 1942); Moore, *Federal Practice* (hereafter "Moore") ¶ 110.13(1) (2d ed. 1982).[9] The Ninth Circuit, however, takes the view that such an order is appealable only if it is "clear" that the court below found that "the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make." App. 2; *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 269 (9th Cir. 1965); *Marshall*

[9]According to Moore:

"An order that dismisses the entire action is clearly final and appealable [citations omitted], even if the dismissal is without prejudice. [Citation omitted.] A line of cases has developed, chiefly in the Ninth Circuit, that distinguishes between a judgment that dismisses the action and one that dismisses the complaint without expressly dismissing the action. It is said that the former is final, but that the latter is final only if it clearly appears that the district court determined that the action could not be saved by an amendment of the complaint.

"The distinction is conceptually sound, since an order that merely dismisses a complaint allows the plaintiff to amend, which he may do of right if no answer has been filed. [Citation omitted.] But it is practically difficult to apply because the court of appeals will often be obliged to guess at what was on the mind of the trial court. *On balance, it seems preferable to assume what is almost always the fact: a plaintiff who appeals has no desire to amend his complaint.*" *Moore* ¶110.3(1).

v. Sawyer, 301 F.2d 639, 643 (9th Cir. 1962). Thus, a conflict exists between the circuit courts of appeal with respect to the appealability of orders dismissing complaints, and this conflict provides another basis for review of this case.

With Professor Moore, we believe that the better view is that orders dismissing complaint are *per se* final and appealable, see note 9, *supra*, and that the finality rule "should be interpreted to prevent the loss of the right of an appeal, not to facilitate loss," *Moore*, ¶ 110.18(3). This view is particularly compelling as applied to the facts of this case. The appealability issue was raised in the defendants' motion to dismiss the appeal, and an appellate panel, in an earlier proceeding, denied the motion on grounds that the order was appealable. Certainly California was entitled to rely on the appellate panel's earlier ruling by continuing to prosecute its appeal, rather than filing an amended complaint in the district court. Therefore, a dismissal order should be deemed appealable once an appellate panel so rules and the case is then briefed and argued on its merits.[10]

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[10]This Court has said that the purpose of the finality rule is to prevent "piecemeal litigation" and avoid having cases "sent up in fragments." *Catlin v. United States*, 324 U.S. 229, 233-234 (1945). There is little danger that these results will occur here, because the majority opinion fully disposes of this case for all practical purposes. According to Moore, the finality rule has been interpreted with "great liberality" to prevent injustice. *Moore*, ¶ 110.18(1). Indeed, in *Forgay v. Conrad*, 47 U.S. (6 How.) 200, 203-206 (1848), this Court held that an order—otherwise "interlocutory"—was final and appealable where the losing party would suffer irreparable harm if appellate review had to await the final outcome of the litigation. Thus, equitable considerations are relevant in determining the appealability of dismissal orders. Since California reasonably relied on the appellate panel's earlier ruling upholding the appealability of the dismissal order, the order should be deemed appealable under 28 U.S.C. § 1291.

Importantly, the appealability issue cannot be resolved without reaching the tribal immunity issue. If California is correct in assuming that tribal officials can only be sued in their "official" capacity for carrying out an unlawful tribal policy, then California cannot possibly amend its complaint to restrain the tribal officials from carrying out the tribal ordinance in this case, and thus—even assuming the correctness of the Ninth Circuit rule—the dismissal order is final and appealable. The appealability issue is thus inseparably linked to the appealability issue. Assuming that the Court decides to review the case, there is no danger that it may rule on the appealability issue without reaching the tribal immunity issue.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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(Appendices follow)

APPENDIX A

State of California, Plantiff-Appellant,

vs.

Vincent Harvier, as Chairman of Quechan Tribal Council; George Bryant, William Curran, Joseph Jackson, Anderson Miguel, Jr., and Rebecca Ramirez, as members of Quechan Tribal Council; Neil Hill, as Fish and Game Warden for Quechan Tribe of Indians, et al., Defendants-Appellees.

No. 80-5323.

United States Court of Appeals, Ninth Circuit.
Argued and Submitted Nov. 2, 1981.

Decided March 4, 1983

Appeal from the United States District Court for the Southern District of California.

Before NORRIS and REINHARDT, Circuit Judges, and HAUK* District Judge

REINHARDT, Circuit Judge:

California brought this action under 28 U.S.C. § 2201 (Supp.IV 1980) for a declaratory judgment against the chairman and certain members of the Quechan Tribal Council, and the fish and game warden for the Quechan Tribe of Indians. The state sought a declaration that it was empowered, under "federal Indian law," to apply and enforce its fish and game laws against non-Indians hunting

*Honorable A. Andrew Hauk, Chief Judge, United States District Court for the Central District of California, sitting by designation.

and fishing on the Quechan reservation. California alleged that the tribal officials had threatened the state's game wardens and were denying them access to the reservation (Fort Yuma).

In a prior action, California sought the same declaratory relief against the Quechan tribe itself. We held that the doctrine of tribal immunity barred a suit against the tribe, although we strongly suggested in dictum that some type of legal action was still available to the state. *California v. Quechan Tribe,* 595 F.2d 1153, 1155 (9th Cir.1979). Following our decision California filed a suit against the tribal officials in their official capacities. The district court granted the defendants' motion to dismiss California's complaint, but did not expressly dismiss its action. We hold that we lack jurisdiction to hear the state's appeal from the district court's order.

On our own motion, we consider whether the order dismissing the complaint is an appealable order. Ordinarily, an order dismissing a complaint but not the underlying action is not a final order and is, therefore, not appealable under 28 U.S.C. § 1291 (1976). *Scanlon v. Atascadero State Hospital,* 677 F.2d 1271, 1272 (9th Cir.1982); *Sherman v. American Federation of Musicians,* 588 F.2d 1313, 1315 (10th Cir.1978); *Marshall v. Sawyer,* 301 F.2d 639, 643 (9th Cir.1962). We may regard such an order as final and appealable only if the record shows "special circumstances," *Firchau v. Diamond National Corp.,* 345 F.2d 269, 270-71 (9th Cir.1965); such that it is "clear" that the court below found that "the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make. . . ." *Marshall,* 301 F.2d at 643 (citations omitted). *See generally* 9 J. Moore, *Moore's Federal*

Practice ¶ 110.13[1] (2d ed. 1982). Here it is far from clear that the district judge found that California's action could not be saved by any amendment of the complaint.

In its order granting defendants' motion to dismiss, the district court said:

> Lower court cases on point have drawn a distinction between suits against tribal members in their individual capacities, which may be maintained, and suits against them in their representative capacities, which may not be maintained. The present claim is clearly brought against the defendants in their representative capacities. . . . In fact, plaintiff's counsel admitted during argument that this suit is brought against the defendants in their capacity as members of the Tribal Council.

It is not at all clear from the district court's remarks that it found that the plaintiff's action could not be saved by any amendment of the complaint which California could reasonably be expected to make. Specifically, the court did not advise the parties how it would rule if the state amended its complaint to allege a cause of action under *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

In its order, the court relied on the distinction between suits against tribal members in their individual capacities, and suits against tribal officers acting within their representative capacities. It read the complaint as pleading only the latter type of suit and read *California v. Quechan Tribe*, 595 F.2d 1153 (9th Cir.1979) as barring such suits. The district judge did not rule, however, that tribal immunity precluded the state from amending its complaint to allege that the tribal officials had exceeded the scope of their

authority or were otherwise subject to suit in their individual capacities.

California complaint names the defendants "as members of Quechan Tribal Council" in its caption. In the body, the complaint states that "[d]efendants are officers of the Quechan Tribe of Indians and are sued in their capacity as such." In describing the nature of the alleged controversy, California states that defendants acted "in their capacity as officers of the Quechan Indian tribe." California did not name the defendants in their individual capacities or contend that the defendants were acting *ultra vires* or unconstitutionally. It did not allege that any unlawful conduct was taken by defendants in their individual capacities. Nor did it adequately make such an argument in its papers opposing defendants' motion to dismiss. To the contrary, by its complaint and in its argument on the motion to dismiss, the state focused the district court's attention on whether the tribal immunity rule is applicable to tribal officials acting in their official capacities, as well as to the tribe itself.

Defendants noted in their reply memorandum that plaintiff's complaint did not contain allegations necessary to invoke *Ex parte Young* but instead was based on the state's contention that tribal immunity does not bar suits against officials of Indian tribes. At oral argument defendants again stressed the *Ex parte Young* issue, and expressly acknowledged that under appropriate circumstances tribal officials may be stripped of their immunity and sued as individuals.

We have carefully studied the remarks of counsel and the district court at the hearing on the motion to dismiss.

Almost all the remarks of the participants in the dialogue are, when read in context, ambiguous to some extent. However, we note that early in the oral argument, counsel for the state emphasized the state's fundamental point, saying, "And to my knowledge the Supreme Court has never held that the sovereign immunity doctrine extends to tribal officials." Then, toward the end of the oral argument, counsel for the state advised the court, "Well, I would just say, briefly, your Honor, that it's correct, we are suing the tribal officials in this case in their capacity as tribal officers."

It is clear that counsel did not adequately raise or present the issue whether jurisdiction could properly have been pleaded by suing the tribal officers in their individual capacities on an *Ex parte Young* theory. It is not possible to determine with any certainty how the district judge would have ruled had a complaint been before him containing such allegations. The judge's order did not preclude appellant from filing an amended complaint of that nature, and we do not believe the ambiguous colloquy can fairly be construed as "clearly" demonstrating that the district court determined that no possible amendment could save the complaint. Thus we do not find the requisite "special circumstances" present here, and we decline to treat an order dismissing the complaint as a final order for purposes of 28 U.S.C. § 1291.

This case well illustrates the sound policy reasons underlying the final order rule we apply here. Our dissenting colleague urges us to decide important and complex issues of law regarding the sovereign immunity of Indian officials for actions taken pursuant to the valid constitution, bylaws and ordinances of the Indian nation. *See generally Califor-*

nia v. Quechan Tribe, 595 F.2d at 1154; *Quechan Tribe v. Rowe,* 531 F.2d 408, 408-10 (9th Cir. 1976). Yet the record before us is wholly inadequate for that purpose. In this respect, we need only note that the principal arguments and theories relied on in the dissenting opinion were never presented to or considered by the district court.

There can be no doubt that the final order rule is more than a mere formality. The rule embodies the substantive policy that legal issues should be developed initially before the district courts. The State's failure to amend its complaint when it reasonably could have been expected to do so deprived the district court of the opportunity to fully explore the sovereign immunity questions raised by the dissent. Our decision that we have no jurisdiction is simply a reaffirmation of the important substantive policy that we have long recognized. *See, e.g., Quechan Tribe v. Rowe,* 531 F.2d at 412 (Wallace, J., concurring) (where a legal question "has serious consequences and is an issue upon which there is a diversity of opinions . . . [t]he developmental process before the district court would provide us with a better foundation upon which to make our decision."); *Westinghouse Electric Corp. v. Weigel,* 426 F.2d 1356 (9th Cir.1970).

The dissenting opinion, although it sets forth a number of novel and interesting concepts, is largely irrelevant to the narrow question of law decided here. The entire thrust of our holding is that no final order has been issued by the district court. Although the specific complaint was dismissed, plaintiff's underlying cause of action remains before the lower court. *See supra,* slip op. at 962, at ..... Consequently, the State of California could have amended its

complaint to allege another potentially permissible basis for jurisdiction. Specifically, the State could have amended its complaint after the order of dismissal and placed the *Ex parte Young* question squarely before the district judge. Because California failed to do so, the order dismissing the complaint is not a final order and thus is not appealable. As a result, it is simply not necessary to reach the issues discussed in the dissent.[1]

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[1]Even though we need not resolve the issues raised in the dissent, it is important to note that none of the arguments relied on was ever presented to the district court by the State of California. Rather than proceeding on an *Ex parte Young* theory, California repeatedly emphasized that the defendants were being sued in their official capacities. *See supra* slip op. at 963, at . . . . In its brief to this court, the State candidly admits that

> [s]ince the effect of our action would restrain the Tribe from acting to prevent California fish and game officials from entering the reservation to enforce California laws against non-Indians, our action must . . . be considered as an action against the Tribe rather than against tribal members acting in their individual capacity.

In dismissing California's complaint, the district judge did not foreclose the possibility that the complaint could be amended to state a cause of action against the Indians in their individual capacities under an *Ex parte Young* theory. *See, e.g., United States v. State of Oregon,* 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981); *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061, 1062 (1st Cir. 1979). California failed to make such an amendment.

Moreover, the State of California never argued before the district court that any constitutional violations had been committed by the Indians acting in their official capacities. Even the State's brief on appeal implicitly disclaims any sort of constitutional argument. Rather, the State relied entirely on the theory that the Indians acting in their official capacities, had violated "general principles of federal Indian law." Although we do not resolve the issue here, we have serious doubt as to whether highly ambiguous allegations that "general federal law" has been violated are sufficient to strip the shield of sovereign immunity from Indian officers acting in their

The appeal is dismissed for lack of jurisdiction.

NORRIS, Circuit Judge, dissenting.

I

I respectfully dissent.

I understand the majority's position to be that the district judge's order dismissing the state's complaint is not appealable because it is not clear that "the action could

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official capacities. *See, e.g., Butz v. Economou,* 438 U.S. 478, 520, 98 S.Ct. 2894, 2917, 57 L.Ed.2d 895 (1978) (Rehnquist, J., concurring in part and dissenting in part); *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 701, 69 S.Ct. 1457, 1467, 93 L.Ed. 1628 (1948). *See also* 14 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3655 at 184 (1969) ("plaintiff specifically must allege the statutory limitation on which he or she relied . . .; conclusory allegations about 'illegal' or 'unauthorized' acts are not enough.").

Perhaps in response to the inherent weaknesses in California's complaint, the dissent argues that the provisions of 18 U.S.C. § 1162 and 28 U.S.C. § 1360 may also have been violated. *See infra* slip op. at 967, at . . . . While there is a brief mention of the two statutes in its complaint, the State of California never attempted to explain how the Indians violated those provisions. Indeed, the statutes were not even discussed by the State in its memorandum or during oral argument before the district court. Moreover, the two statutes are procedural in nature, and it is questionable whether they can be read as congressional withdrawals of the Indians' sovereign immunity in this sort of case. *See, e.g., Quechan Tribe of Indians v. Rowe,* 350 F.Supp. 106, 109 (S.D. Cal. 1972) and cases cited therein, *aff'd,* 531 F.2d 408 (9th Cir. 1976). Nevertheless, the dissent argues, without citing any authority, that the Supremacy Clause of the United States Constitution is violated when officers of an Indian tribe violate state law after the state has been authorized to apply its law by federal statute. This novel Supremacy Clause theory may or may not have merit, but it was never suggested by the State and was not considered by the district court. In view of California's failure to amend its complaint, we need not speculate how courts would rule on such a Supremacy Clause argument if one were ever properly raised.

not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make . . . ." *Marshall v. Sawyer,* 301 F.2d 639, 643 (9th Cir.1962). Particularly, the majority distinguishes between suits "against tribal members in their individual capacities, and suits against tribal officers acting within their representative capacities" and suggests that California should have amended its complaint to allege "that the tribal officials had exceeded the scope of their tribal authority or were otherwise subject to suit in their *individual* capacities." (Emphasis added). Had it done so, the majority suggests, it would have raised allegations sufficient to invoke the doctrine of *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and thus given the district judge an opportunity to rule on whether tribal sovereign immunity barred the state's action against the tribal officials.

I agree that California did not allege that the tribal officers had exceeded the scope of their tribal authority. I agree, moreover, that had the state done so it would have invoked the doctrine of *Ex parte Young.* Yet, where the majority errs, and where I disagree, is in its suggestion that suing the tribal officials for acting *ultra vires* is the *only* way to invoke the doctrine of that case. There are two theories that invoke the doctrine of *Ex parte Young. See Washington v. Udall,* 417 F.2d 1310, 1314 (9th Cir.1969) One, certainly, is that government officials acted beyond the scope of their statutory authority. *United States v. Raines,* 362 U.S. 17, 25-26, 80 S.Ct. 519, 524-525, 4 L.Ed.2d 524 (1960); *Home Tel. & Tel. Co. v. City of Los Angeles,* 227 U.S. 278, 287-89, 33 S.Ct. 312, 314-315, 57 L.Ed. 510 (1913). This theory the majority recognizes. The other theory consists of an allegation that the government offi-

cers, though not acting *ultra vires,* were "carrying out official duties in violation of the Constitution." *Washoe Tribe of Nevada & California v. Greenley.* 674 F.2d 816 at 818 (9th Cir.1982). *See also Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689-90, 69 S.Ct. 1457, 1461, 93 L.Ed. 1628 (1949); *Ex parte Young,* 209 U.S. at 149-60, 28 S.Ct. at 449-454. It is this theory the majority completely ignores and on which California rests its complaint.[1]

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[1]The concept of suits against persons in their "individual" instead of "representative" capacity appears to be a source of much confusion in this case. The majority does not distinguish between the two, and the district court merely stated conclusorily that "[l]ower court cases on point have drawn a distinction between suits against tribal members in their individual capacities, which may be maintained, and suits against them in their representative capacities, which may not be maintained." [E.R. 2]

This confusion, I think, derives from the fact that there are two types of suits against individuals, one invoking the doctrine of *Ex parte Young* and the other having nothing to do with that case at all. These two types of suits were discussed by the Supreme Court in *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). There the court noted that

> "If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. [For example], [i]f the War Assets Administrator had completed a sale of his personal home, he presumably could be enjoined from later conveying it to a third person. On a similar theory, where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in way which the sovereign has forbidden."

Id. at 689, 69 S.Ct. at 1461.

While the Court in *Larson* seems to have believed that the two suits are founded "on a similar theory," they clearly are not. The suit to enjoin the sale of the house has nothing whatsoever to do with the sovereign. It is simply a suit against an individual who

California averred in its complaint a right to enter the reservation and apply its laws to non-Indians there pres-

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happens to work for the sovereign. The suit has no more to do with the government than a suit against a business executive arising out of a vacation traffic accident has to do with the company which employs him.

The suit against a government official for exceeding his statutory powers, however, stands on quite a different footing, for such a suit directly invokes the doctrine of *Ex parte Young*. In that suit, the claim is that, while acting under color of law the official went beyond his statutorily delegated power. Such a suit invokes the doctrine of *Ex parte Young* in that it is designed to enjoin an officer who, because he is acting beyond the scope of his authority, is acting in violation of federal law.

The difference between the two cases is that in the case of the suit against the government official, the official, though acting *ultra vires*, is acting under color of law. This is a theme common to all cases brought under the theories of *Ex parte Young*. For analytical purposes, therefore, I prefer to think of *Ex parte Young* as consisting of two branches. The first consists of suits alleging that as a result of an act, a government officer is acting in violation of federal law. The second consists of suits alleging that the officer, though not acting *ultra vires*, is acting under a statute or ordinance which is either preempted by federal law or directly violates the Constitution. Each branch, then, involves an allegation that an officer of the government acting under color of law, violated federal law.

Civil suits against individuals, on the other hand, I prefer to think of as those in tort or contract, unrelated to the conduct of the individual as an officer of the state and regarding acts not taken under color of law. These suits, obviously, have nothing to do with the doctrine of *Ex parte Young*.

When analyzed in this fashion this case becomes clear. California does not complain of any individual act. No one has tried to sell the state a house he does not own. Instead, California complains under what I have called the second branch of *Ex parte Young*. It complains that tribal officers, acting under an ordinance of the Tribe, are violating federal law in refusing state officers access to the Fort Yuma Reservation to enforce state fish and game laws. Whether such a complaint can be brought without running afoul of the doctrine of sovereign immunity is the question I believe we should be addressing today. *See infra*, Part II.

ent under "general principles of federal Indian law, upon the provisions of Public law 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360, upon the provisions of the California Fish and Game Code, and upon other pertinent laws." It alleged that "defendants maintain that non-Indians who wish to fish or hunt while on [the] reservation need only comply with pertinent rules and regulations adopted by [the] tribe." Specifically, California contended that "defendants, in their capacity as officers of the Quechan Indian tribe, maintain that said tribe has exclusive jurisdiction to regulate the taking of fish and game by non-Indians while on the Fort Yuma Reservation, . . . [that] [d]efendants . . . claim that agents of the state of California cannot enter upon the Fort Yuma Reservation for the purpose of regulating fishing and hunting by non-Indians while on said reservation [and that they] . . . have refused to allow, and have prohibited, authorized agents of the State of California to enter upon the Fort Yuma Reservation for the purpose of enforcing State . . . laws. . . ." Furthermore, the state claimed, "[d]efendants have . . . threatened to arrest any authorized agent of the State of California who enters upon said reservation for the purpose of enforcing State fish and game laws against non-Indians." Finally, the state asked the district court to issue "a decree declaring that the State of California is authorized under federal law to apply its laws regulating the taking of fish and game to non-Indians while on the Fort Yuma Reservation, and that agents of the State of California are authorized under federal law to enter upon said reservation for the purpose of enforcing State fish and game laws against non-Indians." There was thus in the complaint the allegations necessary to inform all who read it that the state sought a declaratory judg-

ment that its theory of federal law was correct, and that the tribal officials could not forbid state officers from entering the reservation without violating federal law.

That is certainly enough to invoke what I have called the second branch of *Ex parte Young*. The state seeks a declaration that the tribal ordinance, which provided that non-Indians could hunt and fish on the Reservation with a permit from the tribe but without a California license, is in conflict with federal law, including federal statutes, and an injunction forbidding tribal officials from applying that ordinance to state officers. If its theory of law is correct, the ordinance may offend the Supremacy Clause and actions taken under color of that ordinance would thus be carried out in violation of the Constitution.[2] Since forbidding state officials from entering the reservation to enforce state laws is an act taken under color of that ordinance, the state clearly seeks to enjoin the "officers [from] carrying out official duties in violation of the Constitution," *Washoe Tribe of Nevada & California v. Greenley*, at 818. It is clear that California's complaint cannot be "saved by any amendment . . . which the [state] . . . could reasonably be expected to make," *Scott v. Eversole Mortuary*, 522 F.2d

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[2]I do not argue, as the majority suggests, that the Supremacy Clause is necessarily violated when officers of an Indian tribe violate state law when the state has been authorized by federal law to apply its statute. All we are required to decide at this stage of the litigation is that California has made a colorable claim that such is the case in these circumstances. Once it has done so, I see no jurisprudential consideration that would require us to consider first whether acts under color of the tribal ordinance offend federal law, and thus, the Supremacy Clause and then, only upon a finding of constitutional violation, to consider whether *Ex parte Young* applies to officers of Indian tribes.

1110, 1112 (9th Cir.1975); *Marshall v. Sawyer,* 301 F.2d at 643, for to amend the complaint to sue the officers as individuals, as the majority and district court demand, would change the gravamen of the state's entire claim. The state has complained of acts under color of an ordinance it alleges is constitutionally void. It has not complained of any *ultra vires* act. It is pointless, and certainly not "reasonable," to suggest that to appeal the district court's decision it must do so now.

I would thus hold the order appealable and would rule that the doctrine of *Ex parte Young* should be applied to suits against officers of Indian Tribes.

II

A

The doctrine of *Ex parte Young* was born out of practical necessity. It represents an accommodation of the principle of state sovereign immunity, as embodied in the Eleventh Amendment, and the principle that, to preserve meaningful supremacy of federal law, there must be a federal forum for the vindication of federal rights. J. Novak, R. Rotunda, J. Young, *Constitutional Law* 52 (1978) ("[T]he Eleventh Amendment was never intended nor held to grant the states the ability to subvert the supremacy clause by immunity from judicial orders to comply with federal law.") *See also* Novak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh Amendment,* 75 Col.L.Rev. 1413, 1445-46, 1455-58 (1975). The rule of *Ex parte Young* is compatible with the Eleventh Amendment because it permits suits for prospective and injunctive relief only—suits that generally place only an ancillary burden on state

treasuries. *See Edelman v. Jordan,* 415 U.S. 651, 663-68, 94 S.Ct. 1347, 1355-1358, 39 L.Ed.2d 662 (1974). Whether or not individual state officers are the nominal defendants, the Eleventh Amendment remains as a bar to suit for money judgments that would be paid from state treasuries. *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 464, 65 S.CT. 347, 350, 89 L.Ed. 389 (1945); *Edelman v. Jordan,* 415 U.S. at 666-69, 94 S.Ct. at 1357-1358.

The Supreme Court has extended the doctrine of *Ex parte Young* to embrace suits against federal as well as state, officials. *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 689-90, 69 S.Ct. 1457, 1461, 93 L.Ed. 1628 (1949). It appears to have sanctioned the extension of that doctrine to Indian Tribes as well.

In *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed2d 106 (1978), plaintiffs brought an action for declaratory and injunctive relief against the Pueblo Tribe and its Governor, asserting that defendants were violating Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-03. *Id.* at 51, 98 S.Ct. at 1673. Although the Court did not elaborate, it stated that "[a]s an officer of the Pueblo, [the Governor] is not protected by the tribe's immunity from suit . . . *cf. Ex parte Young,* 209 U.S. 123 [28 S.Ct. 441, 52 L.Ed. 714] (1908)." *Id.* at 59, 98 S.Ct. at 1677.[3] The suit against the Governor would clearly have

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[3]The Court in *Martinez* dismissed the claims against the Governor, holding that Congress had not intended to grant tribal members a federal cause of action under ICRA, except as provided in the statute. 436 U.S. at 72, 98 S.Ct. at 1681. Appellees read *Martinez* as holding that any suit that would bind a tribe through its tribal officers must fail for lack of a federal cause of action. I would disagree. Whether a suit may be maintained in the face of

bound the Pueblo tribe. The Court's suggestion that tribal immunity did not bar the suit against the Governor, along with its reference to *Ex parte Young,* indicates a willingness to apply the *Ex parte Young* fiction to tribal officers who violate federal law. *See also United States v. Oregon,* 657 F.2d 1009, 1012 n. 8 (9th Cir.1981) (tribal immunity extends to tribal officials acting in their official capacity *and* within the scope of their authority) (emphasis added).

Although I am hesitant to construe *Martinez* as a clear holding that *Ex parte Young* applies to Indian tribes, I am persuaded that both public policy and the jurisprudence of sovereign immunity compel that result.

B

Indian tribes no longer enjoy the status of independent sovereign nations. Through the exercise of the sovereign power of the United States, their status has been reduced to that of "domestic dependent nations." *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831). Although they continue to enjoy attributes of sovereignty, their sovereign powers are now subject to the will of Congress, which has plenary authority to limit, modify, or eliminate the sovereign powers of the tribes. *Santa Clara Pueblo v. Martinez,* 436 U.S. at 56, 98 S.Ct. at 1675 (1978). *See generally* Note, *In Defense of Tribal Sovereign Immunity* 75 Harv.L.Rev. 1058 (1982).

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sovereign immunity whether a particular federal statute gives rise to a cause of action are separate questions. We decide only the former; on remand, the district court must decide whether California has stated, or could state, a claim upon which relief can be granted under the relevant federal laws. *See* Fed.R.Civ.P. 12(b)(6).

Although tribal immunity is not constitutionally protected, courts have long recognized that Indian tribes possess "the common law immunity from suit traditionally enjoyed by sovereign powers." *Martinez,* 436 U.S. at 58, 98 S.Ct. at 1677. I am not persuaded that subjecting Indian tribes to federal court actions for prospective relief under *Ex parte Young* will unduly interfere with the sovereign powers of Indian tribes. Nor am I persuaded that tribal officers may, without a grant of authority from Congress, interfere with the enforcement of valid state laws, and then claim that the Tribe's sovereign immunity bars the state from suing for injunctive relief in federal court. Just as the sovereignty of a tribe must fall before the will of Congress, so too a tribe's immunity must yield when the state[4] brings suit to enforce prospectively the will of Congress.

The courts have recognized that tribal sovereign immunity protects Indian resources against the dissipation that would otherwise be caused by judgments against the tribes. *See Adams v. Murphy,* 165 F. 304, 308-09 (8th Cir.1908). Suits for prospective relief under *Ex parte Young* will, however, have only ancillary effects on tribal resources, and should not unduly jeopardize the tribal treasury. *Cf. Edelman v. Jordan,* 415 U.S. at 667-68, 94 S.Ct. at 1357-1358. ("[A]n ancillary effect on the state treasury is a permissible and often inevitable consequence of the principle announced in *Ex parte Young.*")

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[4]We do not reach the question whether tribal members may bring federal court actions for prospective relief against tribal officers. *Cf. Martinez,* 436 U.S. at 65-72, 98 S.Ct. at 1680-1681 (discussing limited role of federal courts as forum for resolving disputes between tribes and their members).

Appellees argue that the doctrine of *Ex parte Young* should not be applied "wholesale" to Indian tribes and their officers. They point out that the governmental structure of Indian tribes is often quite different from the structure of state or federal governments, and that the source and scope of a tribal officer's authority may often be impossible to ascertain with accuracy. Thus, they contend, federal courts should not presume to determine whether a tribal officer has acted beyond the scope of his tribal "statutory" authority. Brief of Appellees, 28-33. That issue, however, is not before us, as California alleges only that the Tribe's officers, acting under the authority of the Tribal ordinance, are violating California's rights under federal law.

In light of the foregoing analysis, I conclude that tribal sovereign immunity does not bar a suit for prospective relief against tribal officers alleged to be acting in violation of federal law.

III

Further delay in reaching the merits of the state's claim is not the only cost of failing to decide this appeal, for even if the distinction between suit of an individual instead of a representative was meaningful in this context, the majority disregards the fact that we function in the federal courts under a system of so-called "notice pleading." Federal Rule of Civil Procedure 8(a) provides that the complaint, to survive, must contain only "a short and plain statement of the grounds on which the court's jurisdiction depends . . . a short and plain statement of the claim showing that the pleader is entitled to relief and . . . a demand for judgment for the relief to which he deems himself entitled. . . ." Fed.R.Civ.P. 8(a). We no longer live under a system

"better calculated to vindicate scientific rules of pleading than . . . dispense justice." 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1202 at 61 (1969). Yet this is the regime to which the majority's approach hearkens a return. By insisting on niceties in the denomination of the parties when it is quite clear to all what California alleges and asks for in its complaint, the majority places pleading technique above its responsibility to decide important questions of federal law. That is what the change from common-law pleading and the Codes was intended to avoid.

IV

California is entitled to a determination whether the doctrine of *Ex parte Young* applies to Indian tribes. While the state is not, at this stage of the proceedings, entitled to a ruling on the merits of its claim, it should be told, without several years further delay, whether it can bring its claim at all. I would thus hold the order appealable and would rule that the doctrine of *Ex parte Young* should be applied to suits against officials of Indian Tribes acting under color of law in the same manner it is applied to suits against state and federal officials.[5]

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[5]The majority suggests that its decision upholds the integrity of the final judgment rule and, by so doing, ensures better decisions in this court by insisting on the full development of legal issues before the district court prior to our review. I fear the majority ensures only integrity of form and does so at the expense of timely justice.

The majority has seriously confused the final judgment rule with the rule governing appellate review of legal issues not raised before the trial court. As I have pointed out, because it would have been wholly futile for the state to amend its complaint as the majority suggests, the requirements of the final judgment rule have been fully complied with. That rule is thus irrelevant in this case.

If, however, the question the majority is really raising is whether it appropriate for us to reach the *Ex parte Young* issue when it was

The majority's decision today undermines both the system of notice pleading in the federal courts and the spirit of *Ex parte Young*. I believe it errs in so doing.

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not argued as fully as the majority would liked before the district court, I believe it errs in its conclusion on that point as well. It is clear to me that the state has raised allegations sufficient to invoke the doctrine of *Ex parte Young*. That it did not argue the doctrine below as well as the majority would have liked in no sense precludes our consideration of whether *Ex parte Young* applies in this case. Our job is not to remand with instructions to improve the quality of advocacy. The majority cites Judge Wallace's concurring opinion in *Quechan Tribe v. Rowe*, 531 F.2d 408, 412 (Wallace, J., concurring) for the proposition that the full development of legal issues before the district court would "provide us with a better foundation upon which to make our decision." The majority fails, however, to note that Judge Wallace was reluctant to decide the issue not raised at all before the district court in that case *only* because there exist[ed] an alternative ground . . . to sustain the judgment of the district court [therefore] there [would] be no miscarriage of justice" by refusing to decide the particular issue. Here, however, such is not the case. As the Supreme Court noted in *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941).

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which all courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not requires sacrifice of the rules of fundamental justice.

This case has been going on now, without so much as a hint of adjudication on the merits, for over seven years. The majority dismisses the appeal in the hope of achieving compliance with technical niceties and improvement of the advocacy below. If such a delay to achieve such goals is not a "sacrifice of the rules of fundamental justice," 312 U.S. at 557, 61 S.Ct. at 721, I do not know what is.

APPENDIX B

United States District Court
Southern District of California
Civil No. 79-1694-T
State of California,
Plaintiff,

vs.

Vincent Harvier, as Chairman of Quechan Tribal Council; et al.,
Defendants.

[Filed April 24, 1980]

ORDER GRANTING MOTION TO DISMISS

The State of California brings this action against various individuals who are officials of the tribe of Quechan Indians, in order to compel them to allow the State of California to enforce its fish and game laws on the Quechan reservation against non-Indians. The defendants bring the present motion to dismiss based on the doctrine of sovereign immunity of Indian tribes.

In an earlier action, the State proceeded directly against the Quechan tribe. The Ninth Circuit held that such a suit is barred by tribal immunity. *People of the State of California v. Quechan Tribe of Indians,* 595 F.2d 1153 (9th Cir. 1979).

This suit varies from the previous one only in that the defendants are not the tribe itself, but various members of the Tribal Council and the Fish and Game Warden of

the Tribe. The State of California argues that the doctrine of tribal immunity does not apply where the defendants are individual members of the tribe.

The United States Supreme Court has discussed the issue of the application of tribal immunity to individuals, but it has not established any clear directives. The Court has stated that under some circumstances a suit may be maintained against individual members of an Indian tribe, but has not enunciated any rule for determining those circumstances. See *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978); *Puyallup Tribe v. Washington Dept. of Game,* 433 U.S. 165, 171-172 (1977).

Lower court cases on point have drawn a distinction between suits against tribal members in their individual capacities, which may be maintained, and suits against them in their representative capacities, which may not be maintained. *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061, 1064 (1st Cir. 1979); *State of Wisconsin v. Baker,* 464 F.Supp. 1377, 1380 (W.D. Wisc. 1978).

The present claim is clearly brought against the defendants in their representative capacities. This is apparent from the caption of the complaint; it is also apparent in that the relief sought would compel the defendants to act as representatives of the tribe. In fact, plaintiff's counsel admitted during argument that this suit is brought against the defendants in their capacity as members of the Tribal Council.

Thus, the case law holds that a suit such as this is barred by the doctrine of the sovereign immunity of Indian Tribes.

Accordingly, the defendants' motion to dismiss is hereby GRANTED.

SO ORDERED.

Dated: April 24, 1980.

/s/ HOWARD B. TURRENTINE
United States District Judge